STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Owens, P.J.; Gleicher and Stephens, J.J.

MICHIGAN COALITION OF STATE EMPLOYEE UNIONS, INTERNATIONAL UNION UAW AND LOCAL 6000, MICHIGAN CORRECTIONS ORGANIZATION/SEIU, MICHIGAN PUBLIC EMPLOYEES/SEIU LOCAL 517M, MICHIGAN STATE EMPLOYEES ASSOCIATION, AFSCME LOCAL 5, MICHIGAN AFSCME COUNCIL 25, ANTHONY MCNEILL, RAY HOLMAN, ANDREW POTTER, ED CLEMENTS, AMY LIPSET, WILLIAM RUHF, KENNETH MOORE, RUSSELL WATERS, MARK MOZDZEN, and KATHLEEN WINE/ALL OTHERS SIMILARLY SITUATED,

Plaintiffs/Appellees,

v.

STATE OF MICHIGAN, STATE EMPLOYEES RETIREMENT SYSTEM, STATE EMPLOYEES RETIREMENT SYSTEM BOARD, DEPARTMENT OF TECHNOLOGY MANAGEMENT AND BUDGET, DEPARTMENT/DIRECTOR OF TECHNOLOGY MANAGEMENT AND BUDGET, DIRECTOR OF RETIREMENT SERVICES OFFICE, and STATE TREASURER

Defendants/Appellants.

Supreme Court No. 147758

Court of Appeals No. 314048

Court of Claims No. 12-17-MM

THE APPEAL INVOLVES A RULING THAT A PROVISION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

BRIEF ON APPEAL – MICHIGAN CIVIL SERVICE COMMISSION (AMICUS CURIAE)

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TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Constitutional Provisions

Other Authorities

STATEMENT OF JURISDICTION

The Civil Service Commission ("Commission") agrees with the Appellant's Statement of Jurisdiction, and it, being represented by counsel acting as Special Assistant Attorneys General, hereby submits this Brief on Appeal under MCR 7.306(D)(2).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

Because Defendants' proposed "Counter-Statement of Questions Presented" is premised on inaccurate assertions and is misleading, the Civil Service Commission presents the following proposed question to be answered by this Court:

I. Whether 2011 PA 264 is unconstitutional as applied to the classified civil service, in that it violates Article 11, § 5 of Michigan's Constitution by intruding into the exclusive sphere of authority of the Civil Service Commission.

Court of Claims answered: Yes.

Court of Appeals answered: Yes.

Civil Service Commission answers: Yes.

Plaintiffs/Appellees answer: Yes.

Defendants/Defendants answer: No.

The Supreme Court should answer: Yes.

"The Civil Service Commission by the constitutional grant of authority is vested with plenary powers in its sphere of authority. Since that grant of power is from the Constitution, any executive, legislative or judicial attempt at incursion into that 'sphere' would be unavailing." *Council No 11, AFSCME, AFL-CIO, et al v Michigan Civil Service Comm'n,* 408 Mich 385, 408; 292 NW2d 442 (1980) (citations omitted)

I. INTRODUCTION AND SUMMARY OF ARGUMENT

For the last 70+ years, Michigan courts, including this Court, and Attorneys General have recognized that the Civil Service Commission has exclusive, plenary power within its constitutional sphere of authority under Article 11, § 5 of the Michigan constitution to fix "compensation" and regulate "conditions of employment" for civil servants, into which the Legislature may not intrude. Const 1963, art 11, § 5. Act 264 is yet another attempt, among other recent attempts, to undermine the Commission's constitutional powers. This Court should affirm the Court of Appeals decision because Act 264 is a unilateral attempt by the Legislature to reduce and fundamentally alter compensation and conditions of employment for civil servants. The statute is, therefore, unconstitutional as applied to the Commission and civil servants.

Relying on a strained reading of both Article 11, § 5 and history, Defendants contend that civil servants' pension benefits do not involve "compensation" or "conditions of employment" under Article 11, § 5. But only a dramatic change in the current state of the law – seven decades in the making – will permit this Court to reach that conclusion. Indeed, this Court, the Court of Appeals, and numerous Attorneys General have held that "compensation" means more than wages, and includes fringe benefits. By forcing civil servants to choose between staying in the defined benefit plan and reducing current take-home wages or losing altogether the defined benefit plan, Act 264 impermissibly alters their Commission-approved compensation.

Moreover, the phrase "conditions of employment" has been interpreted by Michigan and federal courts to include retirement benefits. Because Act 264 forcibly alters retirement benefits approved by the Commission as part of an overall compensation package, the Legislature has

intruded impermissibly into the Commission's sphere of plenary authority under Article 11, § 5. The Legislature may not do indirectly what it cannot do directly. If this Court were to permit it to do so here, nothing would prevent the Legislature from increasing the mandatory contribution for civil servants to 25%, 50%, or 100% and reintroducing the very legislative interference against which Article 11, § 5 was designed to protect. Act 264 is, thus, unconstitutional as applied to civil servants.

II. STATEMENT OF THE FACTS

The Commission presents the following summary of the history of the Commission, its unique position in state government, its prominent role in providing retirement benefits for civil servants, and its unique constitutional authority, with the goal of placing the issues before this Court into an historical context.

A. History of the Civil Service Commission

1. Civil Service Was Created to Rid State Government of Political Patronage and the "Spoils System," Free From Legislative Influence

The State's civil service system began as a result of the 1936 Report of the Civil Service Study Commission appointed by Governor Frank Fitzgerald, which examined state personnel practices and concluded that a longstanding "spoils system" or "patronage system" plagued the state, where political appointments, promotions, demotions, rewards, and punishments threatened the functionality of the civil service. *Council No 11,* 408 Mich at 397-98; see also *Report of the Civil Service Study Commission,* at 3 (1936) (Exhibit 1).[1] Before the introduction of civil service, Governor Fitzgerald stated, "Patronage is today the most corroding influence in popular government. No administration, no matter how clean its motives may be, nor how wise its

[1] All citations will be to the Exhibits attached to the Commission's Brief in Opposition to Appellant's Application for Leave to Appeal, unless otherwise noted.

policies, can render full service to the people so long as the patronage evil exists." *Report of the Civil Service Study Commission*, at 3.

In 1936, after a nine-month investigation of Michigan's state workforce, the Civil Service Study Commission released a damning indictment of the spoils system that had developed:

> Under the spoils system it is to be expected that employees who have received their jobs because of friendship with or usefulness to some party or politician should continue their political work even while holding a state job. At any rate this has always been the case. The spoils system presupposes the existence of government jobs to be filled with loyal party workers who can be counted on not to do the state job better than it can be done by others, but rather to do the party work or the candidate work when elections roll around. The state office buildings are nearly empty during political conventions, and state money has always been used—indirectly of course—to enable state employees to move about the state and keep political fences in repair.
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> * * *
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> A necessary corollary of the system of political appointment is the system of political assessments. The practice is based on the principle that the office holders are indebted to the party for their appointments, and since they have been the greatest beneficiaries of the party's work, they should show their interest and appreciation by contributing to party funds. Unless the party is kept in power, they will lose their jobs, so that in addition to voting it is incumbent upon them to contribute. To establish the practice definitely, parties have laid down the rule that an officeholder is expected to pay a certain percentage of his salary every year, or every campaign year, to the party treasury. In Michigan one to two per cent has usually been the amount set, and state employees have had to contribute at the time of campaigns, to show their loyalty and support. The actual collecting of the money is handled in various ways to make it appear less objectionable. A contribution to a flower fund, the purchase of an emblem, the payment of dues to a club—these and other subterfuges are used to get money at campaign time. And although the exact amount is seldom requested, the employee knows what is expected, and he seldom fails to come across.

Id. at 45-46.

The 1936 Civil Service Study Commission, therefore, recommended legislation to establish a state civil service system, which was enacted in 1937 and "purported to eliminate the 'spoils system'." *Council No 11*, 408 Mich at 398; see also 1937 PA 346. Led by pro-patronage legislators, however, new legislative enactments of 1939 greatly scaled back the classified civil

service, and the political gamesmanship in the civil service continued. *Council No 11*, at 399.[2]

> Finally, in 1940, apparently dissatisfied with four years of political maneuvering and legislative advance and retreat on the civil service system issue, the people of Michigan adopted a constitutional amendment establishing a constitutional state civil service system.

Id. 400-01. The amendment, effective January 1, 1941, superseded the 1939 legislation. See Const 1908, art 6, § 22; see *Reed v Civil Service Comm*, 301 Mich 137; 3 NW2d 41 (1942).

2. In 1941 the People Conferred on the Commission Constitutional Powers that the Legislature Could Not Penetrate

The 1941 amendment to the 1908 Constitution, creating a constitutional Civil Service Commission, stated in pertinent part as follows:

> The [Civil Service Commission] shall classify all positions in the state civil service according to their respective duties and responsibilities, **fix rates of compensation** for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the state civil service, make rules and regulations covering all personnel transactions, **and regulate all conditions of employment in the state civil service.**

Const 1908, art 6, § 22 (emphasis added). The Michigan Supreme Court recognized in 1942 that

> The adoption of the amendment by the electorate may indicate that the previous civil service statutes and the administration thereof were not satisfactory. . . . We must conclude that the civil service amendment was written into the fundamental law in part at least because of popular dissatisfaction with then existing conditions. It is a proper inference that the citizens of Michigan may have desired and intended to bring about a betterment in administration of State employment civil service.

Reed, 301 Mich at 154.[3]

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[2] These "reforms" came to be known as the "Ripper Act." 1939 PA 97 and 1939 PA 245.

[3] A more recent Michigan Supreme Court opinion from 2001 succinctly described the constitutional creation of the Commission as resulting from the people being "[f]ed up" with the Legislature's actions. *Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 221; 634 NW2d 692 (2001).

From 1941 to 1963, Michigan Courts (including this Court) and Attorneys General interpreted the meaning of the new constitutional powers granted to the Commission as *absolute* and *plenary*. For example, on January 11, 1941, Attorney General Herbert J. Rushton responded to Auditor General Vernon J. Brown's request to describe the constitutional amendment's effect. The understanding of the state's chief law officer, who was elected on the same ballots adopting the amendment, was as follows:

> The rules adopted by said Commission **will have the force and effect of law** the same as if the legislature had been designated to do that work and said rules must be respected in the same degree. . . . To make it clear, the Amendment has given the Commission the power and authority to make its own laws and to construe the Amendment in every particular.

Unpublished opinion of the Attorney General (No. 18,505, January 11, 1941) (from Herbert J. Rushton to Vernon J. Brown) (Exhibit 2) (emphasis added).

This Court took the same view of the Commission's authority under the new Article 6, § 22, consistently and repeatedly describing the Commission's power as "plenary" during the years soon after its adoption. *Reed, supra* at 148 (1942) (Bushnell, J, Concurring) ("Unquestionably the civil service commission is a constitutional body possessing plenary power."); *Plec v Liquor Control Comm*, 322 Mich 691, 694; 34 NW2d 524 (1948) ("the civil service commission by the above mentioned constitutional amendment is vested with plenary powers in its sphere of authority."); *Groehn v Corporations & Securities Comm*, 350 Mich 250, 259; 86 NW2d 291 (1957) (noting "its plenary powers").[4]

For the 22-year period following the people's adoption of Article 6, § 22 in 1941, at least six *different* Attorneys General had an opportunity to interpret the Commission's authority, each

[4] The third edition of Black's Law Dictionary from 1933 defined plenary as "Full; entire; complete; unabridged." The revised fourth edition of Black's Law Dictionary from 1968 defined plenary as "Full, entire, complete, absolute, perfect, unqualified." (Exhibit 29).

reaching essentially the same conclusion:

- **Attorney General Herbert J. Rushton:** "The Civil Service Commission has complete control over conditions of employment. . . ." OAG, 1941, No 20212, p 187 (June 5, 1941) (Exhibit 3).

- **Attorney General Herbert J. Rushton**: "...if the legislature has by legislative enactment fixed the salaries of some directing heads of departments which naturally would be under the civil service, the fixing of these salaries is a nullity and of no effect." OAG 1941-1942, No 20551, p 244 (July 23, 1941) (Exhibit 4).

- **Attorney General Herbert J. Rushton:** "It must first be observed that the Civil Service Amendment and the Rules and Regulations properly adopted by the Civil Service Commission pursuant thereto necessarily supersede the provisions of the Veterans' Preference Act. . . ." OAG, 1943, No 1318, p 531 (September 20, 1943) (Exhibit 5).

- **Attorney General Foss O. Eldred:** "When this section was adopted the legislature apparently was divested of its power to the extent that power was vested in the civil service commission, that is, the legislature apparently could no longer control conditions of employment in the state civil service. . . . The state labor law has been abrogated to the extent that it deals with conditions of employment in the state civil service. That field belongs exclusively to the civil service commission and the fact that it may not have occupied the whole field or exercised its full powers by rule or regulation makes no difference. The field of state employment is closed to the legislature." OAG, 1947-48, No 5133, p 89, 91 (October 23, 1946) (Exhibit 6).

- **Assistant Attorney General Maurice M. Moule:** "Regulation of employment within the state civil service. . . ha[s] been lodged by the civil service amendment in the Civil Service Commission. Those matters being properly within the cognizance of the Civil Service Commission and within its rule making power, it is our opinion that the penalty provisions included in the bill under review conflict therewith and may not be given effect." OAG, 1947-48, No 316, p 297 (May 6, 1947) (Exhibit 7).

- **Attorney General Stephen J. Roth:** "[T]he constitutional provision which, as shown above, gives the Civil Service Commission complete control over conditions of employment . . . of state employees." OAG, 1948-49, No 926, p 219 (May 19, 1949) (Exhibit 8).

- **Attorney General Frank G. Millard:** "When the people of the State of Michigan by constitutional amendment created the Civil Service Commission and vested it with self-executing powers, they conferred upon this body a portion of their sovereignty." OAG, 1953-54, No 1794, p 358 (June 22, 1954) (Exhibit 9).

- **Attorney General Frank J. Kelley**: "Additionally, the Constitution confers upon the Civil Service Commission the plenary power to regulate all conditions of employment in

> the State Civil Service. . . . This [the Legislature] cannot do because it violates the provisions of Section 22 of Article VI of the Constitution and is an invasion of the plenary powers of the Civil Service Commission." OAG, 1962-63, No 4080, pp 446-47 (July 16, 1962) (Exhibit 10).

Thus, by 1963, the plenary nature of the Commission's powers over the Legislature within its sphere of authority was well established. And Defendants' attempt to make something out of the fact that the 1963 Constitution does not expressly address PA 240 is, therefore, unrealistic. Once the Commission's *plenary* authority had been established, there would have been no reason to include in the 1963 Constitution additional language identifying each of the then-existing statutes that might or might not be impacted.

3. The People Reaffirmed in 1963 the Commission's Plenary, Constitutional Powers Within its Sphere of Authority

In 1963, the people of Michigan adopted a new constitution, retaining the Civil Service Commission and its broad, exclusive powers. Renumbered as Article 11, § 5, the constitutional provision provides, in pertinent part, as follows:

> The [Civil Service Commission] shall classify all positions in the classified service according to their respective duties and responsibilities, **fix rates of compensation** for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified **service**, make rules and regulations covering all personnel transactions, and **regulate all conditions of employment** in the classified service.

Const 1963, art 11, § 5 (emphasis added).

The official comments to Article 11, § 5 from the Constitutional Convention explain that "this [section] is a revision of Sec. 22, Article VI, of the [previous] constitution designed to continue Michigan's national leadership among states in public personnel practice, and to foster and encourage a career service in state government." 2 Official Record, Constitutional Convention 1961, p 3405. Delegates elected to preside over the 1961 Constitutional Convention

and assigned to the Committee on the Executive Branch agreed: "All witnesses advised and the committee was unanimous in deciding that the civil service merit system should be retained and that the Michigan constitution should contain a detailed civil service provision." 1 Official Record, Constitutional Convention 1961, 637. Notably, the powers of the Commission are self-contained in Article 11, § 5 and neither require nor permit implementation by the Legislature.

Since the people adopted the 1963 Constitution, Michigan Courts and Attorneys General have continued to reaffirm the plenary authority of the Commission over the classified civil service. For example, many have emphasized the Commission's primacy over the Legislature in governing the classified service:

- "Any question regarding control of conditions of employment in the State service has been resolved by the Michigan Supreme Court [in *Plec*, 322 Mich 691, *supra*]..." such that "[t]he civil service commission by the above mentioned constitutional amendment is vested with plenary powers in its sphere of authority." *SEIU v State Racing Commissioner*, 27 Mich App 676, 681; 183 NW2d 854 (1970) (holding that the Public Employment Relations Act ("PERA") does not apply to the classified civil service).

- "The constitutional supremacy of the Michigan civil service commission with respect to state employees in the classified civil service has been consistently recognized by the Michigan Supreme Court." *Welfare Employees Union v Civil Service Commission*, 28 Mich App 343, 351; 184 NW2d 247 (1970) lv den 384 Mich 824 (Article 11, § 5 trumps Legislature-created rules regarding on-duty activities of classified civil servants).

- The "[Commission] has plenary and absolute powers in its field." *Viculin v Department of Civil Service*, 386 Mich 375, 398; 192 NW2d 449 (1971) (noting the constitutional separation of powers between the Commission (Executive Branch) and the Legislature).

- "Under Michigan law, the provisions of the Michigan Act providing for minimum wages and overtime compensation cannot be applied to employees in the state classified civil service because of the plenary power granted to the Civil Service Commission by Const 1963, art 11 §5 to fix rates of compensation for classified state employees." OAG 1975-76, No 5115, p 722 (December 16, 1976) (Exhibit 11).

- "The Civil Service Commission has the power to adopt rules which may incorporate legislative enactments *in toto*, in part or not at all." OAG 1979-80, No 5480, p 112 (Mar. 27, 1979) (Exhibit 12).

- The "Commission by the constitutional grant of authority is vested with plenary powers in its sphere of authority. Since that grant of power is from the Constitution, any executive, legislative or judicial attempt at incursion into that 'sphere' would be unavailing." *Council No 11*, 408 Mich at 408 (1980) (citations omitted).

- "[I]t is the Civil Service Commission, and not the Legislature, that is given 'supreme power' over civil service employees under art 11, § 5." *Crider v Civil Service Comm*, 110 Mich App 702, at 723; 313 NW2d 367 (1981).

- The Legislature's veto power on compensation is "narrowly drawn," and the Legislature "was not given the power to propose or authorize increases in wages; that power belongs to the commission under art. 11, § 5, paragraph 4." *Michigan Ass'n of Governmental Employees v Civil Service Comm'n* 125 Mich App 180, 187-189; 336 NW2d 463 (1983) (citing Delegate Hatch's comments at 1 Record of the Constitutional Convention of 1961, p 652).

- "Article 11, § 5 gives the Civil Service Commission (an entity of the *executive* branch) the *legislative* power to establish pay rates and regulate conditions of employment in the classified service." *House Speaker v Governor*, 443 Mich 560; 506 NW2d 190 (1993).

- "The [Commission] regulates the terms and conditions of employment in the classified service and has plenary and absolute authority in that respect." *Womack-Scott v Dep't of Corr*, 246 Mich App 70, 79; 630 NW2d 650 (2001).

- "Because the [Commission's] power and authority is derived from the constitution, its valid exercise of that power cannot be taken away by the Legislature." *Hanlon v Civil Service Comm'n*, 253 Mich App 710, 717; 660 NW2d 74 (2002).

- "...it is the Civil Service Commission, and not the Legislature, that is given 'supreme power' over civil service employees under art. 11, §5." *AFSCME Council 25 v State Employees' Retirement System*, 294 Mich App 1, 18; 818 NW2d 337 (2011) (declaring unconstitutional Legislative enactment to force civil servants to contribute 3% of wages to fund state's retirement benefits system) lv den 490 Mich 935; 805 NW2d 835 (2011).

- "The Michigan Constitution delegates plenary and exclusive authority to [the Commission] to set compensation and conditions of employment for public employees." *Attorney General v Civil Serv Commn*, unpublished opinion per curiam of the Court of Appeals, issued January 8, 2013 (Docket No. 306685) (2013 WL 85805) (affirming Commission's authority to expand eligibility rules for civil servants' participation in the State's health plan) lv den 493 Mich 974; 829 NW2d 867 (2013) (Exhibit 13).

B. The Civil Service Commission's Constitutional Authority is Unique

The Commission derives authority from Michigan's Constitution that is unique among similar entities in other states. Not only did the Con-Con Delegates recognize the Civil Service Commission's important role within state government, as noted above, but years later other labor relations experts recognized the virtue of the Commission's broad constitutional authority.

In 1951, an advisory committee convened at the request of the Joint Legislative Committee on Reorganization of State Government issued a Staff Report on "Personnel Administration in Michigan Government." The Staff Report included the following findings regarding the role of the Commission in state government:

> The intention of the framers of the civil service amendment was to provide a permanent and strong civil service system which could not be emasculated by legislative action or inaction, as had been the experience with the Civil Service Act of 1937.
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> Since civil service in Michigan has an unique constitutional basis, not comparable to that in other governmental jurisdictions, earlier Michigan court decisions and those of other states' courts are not controlling in resolving legal controversies which arise in the application of the amendment.
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> Considered in the light of the circumstances which brought about the adoption of the constitutional civil service agency in Michigan, its autonomous, centralizing authority, so comprehensively interpreted by the State courts, is readily understandable.

(Exhibit 14, at pp 9-3, 9-4).

On June 28, 1978, the Civil Service Commission appointed a Citizens Advisory Task Force, Chaired by John A. Hannah (former President of Michigan State University), for the purpose of reviewing Civil Service practices and procedures in Michigan. The Task Force issued its official report in July 1979. *Report of the Michigan Citizens Advisory Task Force on Civil Service Reform: Toward Improvement of Service to the Public* (July 1979) (hereafter

referred to as "*1979 Task Force Report*") (Exhibit 15). The 1979 Task Force noted early in its report that "[t]he Constitution grants broad authority to the Civil Service Commission..." *Id.* at 1. "The detailed and specific authorities and responsibilities granted to the Civil Service Commission by the Constitution result in a merit system operated under Commission rules which generally **have the force and effect of law.**" *Id.*[5] (emphasis added).

When compared to similar entities of other states, according to the 1979 Task Force, the Commission is unique and of an elevated stature within state government because its powers are created by the Constitution. The 1979 Task Force noted:

> The final decision-making power vested by the Michigan Constitution in the Commission generally is exercised by the legislatures of other states which have authorized collective bargaining for their state employees. **In Michigan, the Commission exercises the function of determining the terms and conditions of employment in the classified civil service usually performed by the legislatures in other states.**

1979 Task Force Report, at p 12 (emphasis added). Accordingly, "the Civil Service Commission is responsible for...[m]aking the rules governing the terms and conditions of employment..." *1979 Task Force Report*, at p 17. And for "Legislating the general framework within which the state's relationships with its employees and their organizations are to be conducted." *Id.*

A similar Task Force, chaired by former Michigan Supreme Court Justice, Otis M. Smith, was subsequently convened in the late 1980s. It too recognized the unique role of the Commission in state government, as compared to other states:

> [Article 11, § 5] sets out the authority of the [Civil Service Commission] over rates of compensation and all other conditions of employment in the classified civil service. Such

[5] The 1979 Task Force also recognized that the goal of the Civil Service Commission was to eliminate the patronage and spoils systems that once plagued state government: "Recruiting, hiring, compensating, advancing and retaining public employees on the basis of their individual ability and without regard to political influence and personal favoritism are recognized as values of the citizens of the State of Michigan." *1979 Task Force Report*, at p 6.

> plenary authority vested in the [Civil Service Commission] by Constitution **is unique among the 50 states**.

Citizen's Advisory Task Force On State Labor-Management Relations: Report to Governor James J. Blanchard, p 4 (September 1987) (emphasis added) (Exhibit 16).

C. The Limited Role of the Legislature in the Classified Civil Service

Prior to the 1963 Constitution, the Commission had "absolute authority to set compensation at any time during the course of a fiscal year without legislative oversight." *Mich Ass'n of Gov't Employees v Civil Serv Comm*, 125 Mich App 180, 187; 336 NW2d 463 (1983). Delegates at the 1961 Constitutional Convention debated a change to the Constitution to permit *limited* legislative oversight of the Commission, which debates led to the current version of Article 11, § 5. *Id.* at 187-189. As noted by the Court of Appeals in *AFSCME Council 25*, *supra*, the 1963 Constitution contained a mechanism giving the Legislature specific, but limited, oversight of the Civil Service Commission's ability to reject or reduce compensation for classified civil servants. Specifically, the Legislature, under Article 11, § 5, may reject or reduce proposed increases in compensation for civil servants if both Houses veto the increase by a two-thirds vote. Const 1963, art 11, § 5, ¶7. That is the *only* oversight to decrease compensation within the classified civil service available to the Legislature.

The 1979 Task Force acknowledged that "[t]he Constitution's specific and detailed authorizations to the Civil Service Commission produce a role for it which, in part, is essentially legislative in that its rules have the force and effect of law." *1979 Task Force Report*, at p 13. "The Constitution also affords the Commission a unique degree of independence from the Legislature with its guarantee of an annual appropriation." *Id.* The 1979 Task Force was echoing the sentiment among Con-Con Delegates, which was to permit limited legislative

oversight, restricted to the 2/3 veto for decreasing compensation. Otherwise, the Legislature was not granted any oversight powers over the Commission or civil servants.

While introducing paragraph 4 of Article 11, § 5 to the Convention, the Committee on the Executive Branch explained:

> A substantial majority of the committee recommends that no additional provision leading to direct legislative control or veto of wage determinations be added. The legislature has control, as it properly should, of appropriations. Thus there is a control on the total number of dollars expended on salaries for state classified employees.
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> The committee believes that quality is preferable to quantity. This the present system tends to accomplish. The feeling is evident, though not absolutely provable, that legislative control of wage rates would ultimately result in the opposite, i.e., the quantity principle being predominant.
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> Present and former state legislators appearing before the committee also expressed the view that direct legislative control of wages rates was undesirable because it was likely to result in a chronically depressed wage scale. A modification was proposed to the committee which would establish a system whereby the legislature could veto or adjust by a 2/3 vote of both houses any wage scale established by the civil service commission.

1 Official Record, Constitutional Convention 1961, pp 638-39.[6]

During Con-Con debates over whether to amend Article 11, § 5 regarding the Legislature's limited oversight role, Delegates on both sides appeared to concur that the Legislature's role, no matter how defined, should be quite limited. Delegate Hazen van den Berg Hatch (Republican, Committee on Executive Branch), for example, succinctly summarized the Legislature's anticipated, limited role:

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[6] Although the majority of the Committee on the Executive Branch disagreed with the initial proposal of the two-thirds veto power of the Legislature, an amendment to add that very language carried during subsequent debates among the entire Convention. See 1 Official Record, Constitutional Convention 1961, p 639.

> I would also call to the delegates' attention the 2 limitations which appear in the language; namely, that any modification would require a vote of 2/3 of the members elect of each house and that the legislature would be further prohibited from reducing rates of compensation in effect at the time of the adoption of the rate increase.

2 Official Record, Constitutional Convention 1961, p 3191. This limitation, according to the Committee on the Executive Branch, was expressly included to appease those who believed that the civil service should be accountable to the Legislature in at least some way. 1 Official Record, Constitutional Convention 1961, p 640 ("...this accountability is provided by granting the legislature a 'veto' power over rate increases proposed by civil service."). According to Delegate Hatch, it was their "hope that this language [providing for the legislative veto power] would lead to a greater understanding between civil service and the legislature, and ultimately mutual respect for one another, which apparently has been lacking in the past." 1 Official Record, Constitutional Convention 1961, p 640.

Delegate Tom Downs (Democrat, Vice President, and member of Committee on Emerging Problems), expressed the following position about the limited role of the legislative and executive branches with respect to classified civil servants' compensation:

> I am very concerned that when the state is in a financial crisis there would be an harassment operation where certain legislators might try to use state employees' pay rates as a whipping boy to attempt to solve the financial problems. Now, this would be unsound from the viewpoint of the employee because he would not know what his pay rate was and there would be the tendency to have it not on a career, professional basis but injected into the partisan aspect of government where it does not belong. Wages should be set for government workers not on the basis of a deficit or surplus in the state treasury but on a professional career basis.

2 Official Record, Constitutional Convention 1961, p 3192.[7] Another Republican, Delegate D. Hale Brake (Chair of the Committee on Finance and Taxation), agreed that the Legislature's role

[7] Although Delegate Downs was advocating for an amendment to altogether eliminate the mechanism by which the Legislature could reject or reduce increases to compensation within the classified civil service (which amendment was ultimately rejected), his comments are telling of
Continued on next page.

was to be limited: "There was no intention on my part and I am sure there was not on the others that the legislature should be allowed to juggle salaries and put a cut here and a raise there. That would be improper and should not be permitted." *Id.*[8]

Others, outside the Constitutional Convention, have recognized the independence that the Commission enjoys from the Legislature. For example, former State Representative and Speaker of the House, Bobby Crim, explained:

> The independence of the Civil Service is assured by the Constitutional provisions that give it 1% of the total budget without any accountability to the Legislature. That autonomy was a wise provision. It assures Civil Service freedom from undue pressures from legislators seeking jobs or advancement for constituents.

1979 Task Force Report, at pp 13-14 (quoting former State Representative Bobby D. Crim during the 1973-74 regular session of the Legislature). This narrowly drawn Legislative oversight over the Commission ensured that the Legislature's power "could not be exercised readily" and only "in the event of a real abuse." 1 Official Record, Constitutional Convention 1961, p 652 (further noting that "The amendment [the Legislative veto over increases in compensation] is offered in the spirit of providing accountability to the legislature and...importantly to the people by a fourth branch of our government."). Thus, the Delegates wrote into the constitution, and the people adopted, a very limited role for the Legislature in matters involving compensation-fixing powers of the Commission. No other legislative oversight was enshrined in the constitution to permit legislative decreases in compensation or to otherwise impact compensation of civil servants.

Continued from previous page.
the general sentiment during the Con-Con debates that the Civil Service Commission, not the Legislature, should be in the business of fixing compensation within the classified civil service.

[8] During that same debate, the delegates voted against language that would have permitted the Legislature to "modify" increases to compensation (rather than simply "reject or reduce") by way of supermajority vote, further clarifying the Legislature's limited role vis-à-vis compensation. 2 Official Record, Constitutional Convention 1961, pp 3189-3190.

Official Comments to the 1963 Constitution also describe the Legislature's limited role within the classified civil service: "[Article 11, § 5] continues rigid limitations on political patronage, yet strengthens the role of the chief executive and the administrator and provides for **limited legislative control** of wage increases under specified circumstances." 2 Official Record, Constitutional Convention 1961, p 3405 (emphasis added).

D. History of Retirement Benefits Within the Classified Civil Service

From 1941 to 2010 – when the Legislature unconstitutionally enacted MCL 38.35 (see *AFSCME Council 25*, *supra*) – the Legislature had always respected the Commission's constitutional authority on matters related to civil servants' retirement benefits.[9] In 1941, the Commission invoked its constitutional powers and, by way of Commission Rule, initiated the development of a retirement plan for state employees:

> RETIREMENT. The director, in conjunction with appointing authorities, other supervising officials, the state budget director and members of the legislature, shall prepare and submit **to the commission for approval** and subsequent recommendation to the governor and the legislature for adoption by law, a comprehensive and workable contributory retirement system for employees in the state civil service.

Civil Service Rule XXXVIII (1941) (emphasis added) (Exhibit 17; App 141a). The Legislature followed suit and passed SERA, taking effect in July 1943. 1943 PA 240. Contrary to Defendants' suggestion, the Commission's "Retirement" rule in 1941 did not recognize that the Legislature had the authority to enact a law that would create a retirement system for State employees. Rather, the Commission, in fact, called for the Legislature to do so.[10]

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[9] The Court of Appeals in *AFSCME Council 25* recognized the "record of cooperation" between the Commission and the Legislature. 294 Mich App 1, 25-26 (citing *Crider v State of Michigan*, 110 Mich App 702, 707; 313 NW2d 367 (1981) and *Mich Ass'n of Gov't Employees v Civil Serv Comm*, 125 Mich App 180; 336 NW2d 463 (1983)).

[10] Defendants contend that the Legislature has authority to enact Act 264 because "the ratifiers of the Constitution of 1963 are presumed to have been aware of the more than 20 amendments to

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Indeed, the SERA (at MCL 38.36, now repealed), expressly stated that the amount of the employees' contributions had been agreed to between the Legislature and members of the civil service. See *AFSCME Council 25*, 294 Mich App at 20-22. When the statute was amended in 1955 (1955 PA 237), a similar provision was included, noting that there was consent among the Legislature and members to maintain a contribution component to the retirement system. *Id.* A similar provision is noticeably absent from Act 264. See *Id.* ("Notably absent from this legislation [2010 PA 185] is MCL 38.36, now repealed...that expressly stated that the deduction was the subject of an agreement among members to consent to the deduction and to preclude litigation premised on the deduction.").

The Commission's "Retirement" Rule (above) remained largely unchanged until 1963, when the Commission re-wrote the Rule as follows:

> **Section 31 – Retirement.**
>
> **31.1 Cooperation With State Retirement Board.** – The state personnel director shall cooperate with the State Employees' Retirement Board in maintaining a comprehensive contributory retirement system for state civil service employees.
>
> **31.2. Review and Recommendations.** – The state personnel director shall review and make recommendations to the State Employees' Retirement Board on an agency's request for extension of employment beyond the mandatory retirement age.

Civil Service Rules, Section 31 (1963) (Exhibit 18). Other than a few minor additions to address the elimination of the mandatory retirement age and how to treat employees who return to

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PA 240 enacted between 1943 and 1963." *Defendants' Brief*, p 22. But certainly those who voted for the 1963 Constitution are presumed to also have been aware of the Con-Con Official Comments and the fact that the Commission had previously commanded, via formal Rule, that a retirement system be developed. Defendants' inference that the great mass of people in 1963 wanted the Legislature to unilaterally control retirement benefits within the classified civil service is, therefore, not reasonable.

employment after retiring, the Commission rules on "retirement" have not substantively changed since 1963. Yet, the Commission's role in retirement benefits remained prominent.

Defendants assert that the Commission has demonstrated an "absolute lack of involvement in pension matters for the last 60 years." *Defendants' Brief*, p 31. This is patently false. On December 4, 1973, the Commission created a non-contributing retirement plan, and requested amendments to the statute. Civil Service Commission Minutes (Dec. 4, 1973 (Exhibit 20; App 59b)).[11] The Legislature then adjusted its retirement legislation to comply with the Commission's directive, repealing the previous statutes calling for employee contributions addressed above. See Public Act 216 of 1974, 1974 PA 216 (Eff. July 19, 1974). The Attorney General agreed that the Commission had the constitutional authority to do this: "The commission...has the authority to determine that classified state employees, as part of their compensation, will receive retirement benefits on a noncontributory basis." OAG Letter to Hon. Dan Angel, State Rep. (Feb. 8, 1974) (Exhibit 11; App 73b).

Without objection from the Civil Service Commission, the Legislature amended the statute again in 1996 to: (1) introduce a defined contribution system for new hires; and (2) maintain the current, non-contributory retirement plan for existing employees. See 1996 PA 487. In 2001, the Commission added Rule 5-13, which provides, "A classified employee is eligible for retirement benefits as provided by law." (App 143a).[12] Defendants contend that this, and the

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[11] In 1962, the Commission also unanimously approved a change to retirement fringe benefits – an increase in premiums for retiree health benefits. Civil Service Commission Minutes (Nov. 21, 1962) (Exhibit 19; App 54b).

[12] On November 16, 1999, Governor John Engler issued Executive Order No. 1999-13, which established the Michigan Commission on Public Pension and Retiree Health Benefits "for the purpose of conducting a comprehensive review of relevant practices and issues." In it, Governor Engler instructed the newly-formed commission to carry out its duties "in accordance with the relevant statutes, rules and procedures of the Civil Service Commission and the Department of

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fact that the Legislature has previously amended PA 240 without objection from the Commission, means the Commission relinquished its constitutional authority to the Legislature vis-à-vis retirement benefits. They are mistaken, and they overstate the impact on the State retirement system as a whole. Rule 5-13 instead means that the Commission has *exercised* its plenary constitutional authority over civil servants' compensation and approved civil servants' receipt of retirement benefits as provided in the statutory scheme (to which the Commission did not object). When the Commission has disagreed with the Legislature's attempts to unilaterally change retirement benefits, it has objected and fought over it in Court. See *AFSCME Council 25, supra.* It is a gross misreading of Rule 5-13 to conclude, as Defendants do, that the Commission has "interpreted article 11, § 5 as retaining the Legislature's authority to amend PA 240." *Defendants' Brief*, p 36.[13] Indeed, the Court of Appeals in *AFSCME Council 25* recently rejected these very same arguments.

Based on the foregoing, it cannot be reasonably disputed that the Commission chose to work with the Legislature to create a statutory plan in 1943 and its rules authorize the receipt of statutory retirement benefits under that plan. Absent agreement or acquiescence from the Commission, the Legislature lacks authority to control compensation within the classified civil service, including retirement benefits. For the first time since 1941, the Legislature has, in recent years, ignored the Commission's exclusive authority over compensation for civil servants and has attempted to circumvent it, including through Act 264.

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Management and Budget," recognizing the Commission's powers vis-à-vis retirement and pensions.

[13] In addition, Defendants' argument – focusing on the "as provided by law" language – presumes incorrectly that Act 264 is valid.

E. 2011 Public Act 264 Is A Unilateral Change to the Nature of Retirement Benefits for Classified Civil Servants And Reduces Their Compensation

Effective December 15, 2011, Act 264 amended the SERA to, among other things, force state civil servants in the state's defined benefit plan to choose between: (1) staying in the defined benefit plan, but contributing for the first time 4% of their current salaries toward the plan; or (2) no longer accruing benefits in the defined benefit plan and participating in a 401(k) defined contribution plan. Defendants characterize Act 264 differently, but the bottom line is that the Legislature has attempted to unilaterally change the nature of retirement benefits for classified civil servants such that their pre-Act 264 retirement plan approved by the Commission is no longer an option, and all civil servants would be forced to reduce compensation through either the contribution of take-home pay or the end of new accrual of pension benefits.

Notably, civil servants previously negotiated into their union contracts a 3% raise for fiscal year 2010-2011, which the Legislature attempted to eliminate by way of 2010 PA 185. *AFSCME Council 25*, 294 Mich App 1 (striking down the statute as an unconstitutional attempt to reduce civil servants' compensation). From August to October 2011, civil servants negotiated, through their unions, successor CBAs providing an additional one percent increase in rates of wage compensation in October 2012, resulting in a 4% increase overall over two fiscal years. On October 26, 2011, the CBAs were announced publicly. House Bill 4701, which became Act 264, was reported from Committee the *next day*, on October 27, 2011. The House and Senate passed the bill in November and December 2011, respectively. The Commission approved the successor CBAs on December 15, 2011. On the same day, Act 264 was effective, forcing civil servants to choose between contributing 4% of their salaries to fund retiree pensions or losing their defined benefit pension plan. Defendants ask this Court to believe that Act 264 was not expressly designed to combat these bargained-for raises, but the facts are all too coincidental.

III. ARGUMENT

A. Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo. E.g., *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Questions of constitutional interpretation are also reviewed de novo. *County of Wayne v. Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004) (Young, J.); *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 63; 748 NW2d 524 (2008) (Markman, J.). Here, the Court is asked to interpret the 1963 Constitution, specifically Article 11, § 5, which creates, and grants specific powers to, the Commission. A cardinal rule of constitutional interpretation is "to faithfully give meaning to the intent of those who enacted the law. This Court discerns the common understanding of constitutional text by applying each term's plain meaning at the time of ratification." *Nat'l Pride at Work*, 481 Mich at 67-68 (citing *County of Wayne*, 471 Mich at 468-469).

B. Act 264 Violates Article 11, § 5 of the Michigan Constitution

Although this Court has stated that "the Constitution of the State of Michigan is not a grant of power to the legislature but is a limitation upon its power," it also explained that it must "consider[] the Constitution of the State as a whole" to determine whether it "expressly or by necessary implication denies to the legislative department" certain powers. *In re Brewster Street Housing Site*, 291 Mich 313, 333-334; 289 NW 493 (1939). Article 11, § 5 does just that, by granting the Commission plenary authority over the civil service. And it sets out in no uncertain terms the limited circumstances under which the Legislature may inject itself into the realm of civil service. Specifically, that section provides, in pertinent part, as follows:

> Increase in rates of compensation authorized by the commission may be effective only at the start of a fiscal year and shall requires prior notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal

year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce rates of compensation below those in effect at the time of the transmission of increases authorized by the commission.

* * *

To enable the commission to exercise its powers, the legislature shall appropriate to the commission for the ensuing fiscal year a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year, as certified by the commission.

Const 1963, art 11, § 5. The Constitution is otherwise silent as to the Legislature's ability to affect classified civil servants, including with respect to compensation and conditions of employment. Here the Legislature, nonetheless, has again attempted to intrude into the Commission's exclusive sphere of authority by enacting Act 264 and impermissibly reducing and changing the nature of compensation and conditions of employment.

1. Act 264 is Unconstitutional Because it Usurps the Commission's Authority to "Fix Rates of Compensation"

Because this Court does "not question the **commission's authority** to regulate employment-related activity involving internal matters such as job specifications, **compensation**, grievance procedures, discipline, collective bargaining and job performance...," *Council No 11*, 408 Mich at 406-07 (emphasis added), Act 264, which alters the nature of the civil service, is unconstitutional. The inquiry here is simple: does Act 264, which directly impacts civil servants' retirement benefits, affect "compensation" under Article 11, § 5? If so, it is within the Commission's exclusive sphere of plenary authority, and Act 264 is unconstitutional. Defendants contend that Act 264 has nothing to do with "compensation," as that term is used in Article 11, § 5, largely because the clause at issue in Article 11, § 5 does not expressly refer to

"pension plans" or "retirement benefits." Defendants are wrong, as the great weight of authority belies their theory and holds that "compensation" includes all sorts of fringe benefits.

a. Case Law and Attorney General Opinions Conclude that "Compensation" Includes More than Just Wages

In another (albeit analogous) context, the Supreme Court concluded long ago in *Kane v City of Flint*, 342 Mich 74, 80; 69 NW2d 156 (1955) that retirement pensions, insurance premium payments, and the furnishing of uniforms equal "compensation." In *Bowler v Nagel*, 228 Mich 434, 440; 200 NW 258 (1924), this Court similarly held that pension benefits constitute "compensation." Since then, the Court of Appeals has held that decisions by the Commission affecting the take-home pay of classified civil servants fall within the "compensation" clause of Article 11, § 5 and are, thus, reserved for the Civil Service Commission. See *Crider v State*, 110 Mich App 702; 313 NW2d 367 (1981).

In *Crider*, the Court of Appeals concluded that the Commission had the authority to implement a one-day layoff program affecting classified state employees because reducing the number of work hours was tantamount to reducing the employees' compensation under Article 11, § 5. *Id.* at 723-724. Although the Commission's conduct in *Crider* was not related to fixing gross rates of wages, the Court nonetheless concluded that the Commission's sphere of authority included action that had the effect of reducing or altering an employee's take-home pay. *Id.* If the Commission takes action within its sphere of authority, then it is not for the Legislature to interfere. *Id.* at 723 ("...it is the Civil Service Commission, and not the Legislature, that is given 'supreme power' over civil service employees under art. 11, § 5.").

Michigan's past Attorneys General have also opined that "compensation" within the Commission's control should be construed broadly to include fringe benefits. In 1959, Attorney General Paul L. Adams explained that the Commission's authority to "fix rates of compensation"

and "regulate all conditions of employment" under Article 11, § 5 (then Article 6, § 22) includes the authority to provide for life insurance and health benefits for the classified servants. OAG, 1959-1960, No 3413, p 206 (October 12, 1959) (Exhibit 22). Attorney General Frank J. Kelley opined that the "compensation" clause of Article 11, § 5 "includes within it the power to adopt a **pension program** for state classified employees **since fringe benefits, including pension benefits, are included within the term 'compensation'.**" OAG No 4732, p 66 (1971-1972) (Dec. 29, 1971) (emphasis added) (Exhibit 23; App 75b). More to the point, he concluded that "[m]y review of authorities leads me to the conclusion that the term 'compensation,' within the context of [Article 11, § 5], is a generic term incorporating within its meaning not only salaries but also fringe benefits **including pension benefits.**" *Id.* at 67 (emphasis added).

On January 11, 1974, Attorney General Kelley opined as to the Commission's authority over retirement benefits. He concluded that:

> if the Civil Service Commission, in its judgment, adopts a retirement program as part of the rate of compensation for positions in the classified civil service, such action will represent an increase in the rates of compensation and will be subject to rejection or reduction by the legislature as specified in Const 1963, art 11, § 5.

OAG Letter to State Personnel Director, Sydney Singer (Jan. 11, 1974) (Exhibit 24; App 71b); see OAG, 1977-1978, No 5255, p 327 (January 18, 1978) ("compensation" includes salaries and fringe benefits, including pension benefits, sick leave benefits, premium payments, and group health and life insurance premium payments) (Exhibit 25).

Until recently, there has been very little case law authority interpreting the "compensation" clause of Article 11, § 5. Defendants cite to *Stone v State*, 467 Mich 288; 651 NW2d 64 (2002) to argue that "this Court has recognized the authority of the Legislature to amend PA 240 in a manner that affected the payment of Commission-established compensation." *Defendants' Brief*, p 33. This is, however, a gross misreading of *Stone*, which addressed the

taxability of compensation approved by the Commission. *Stone* did not address the constitutional powers of the Commission or a legislative attempt to unilaterally alter compensation approved by the Commission. *Stone* does not support Defendants' argument.

More recently, in 2011, the Court of Appeals held, in an almost identical case, that the Legislature's attempt to force civil servants to contribute 3% of their take-home pay to fund state retirement health care benefits was an unconstitutional intrusion into the Commission's sphere of authority because the legislation: (1) reduced civil servants' current compensation without obtaining the requisite 2/3 legislative veto in Article 11, § 5; and (2) directly affected retirement benefits, a fringe benefit within the definition of "compensation." *AFSCME Council 25 v State Employees' Retirement System*, 294 Mich App 1, 18; 818 NW2d 337 (2011) lv den 490 Mich 935; 805 NW2d 835 (2011).

Defendants attempt to distinguish *AFSCME Council 25*, but to no avail. Specifically, Defendants describe the 3% contribution struck down in *AFSCME Council 25* as "mandated"; but characterize the forced change to retirement benefits here as "voluntary," *Defendants' Brief*, p 33. Nothing about the provisions of Act 264 at issue is "voluntary." The only *choice* civil servants have under Act 264 is to diminish their take-home compensation by 4% or get out altogether of the defined benefit plan as it existed pre-Act 264 and start contributing their own take-home pay to a defined contribution plan. Presenting to civil servants a Hobson's choice does not render the options "voluntary."[14] **There is *no choice* for civil servants to keep their**

[14] That "[m]ore than 95% said 'yes'" to staying in the DB plan and contribute 4%, as Defendants state, is not evidence that the choice forced upon civil servants is voluntary. Rather, it is evidence that most dislike the idea of giving up their defined benefit plan so much that they will take home 4% less compensation each month to do so. Moreover, Defendants' insistence that Act 264 merely permits civil servants to purchase service credit is untrue and a red-herring. Unlike the other provisions of SERA providing expressly for the *voluntary* purchasing of service credit, see *Defendants' Brief*, p 37, the provisions at issue here are *not* voluntary.

compensation package, including retirement benefits, as established by the Commission prior to Act 264. And under either so-called *choice*, the result is an immediate decrease in compensation. *AFSCME Council 25* is highly instructive in that regard.

More recently, in January of 2013, the Court of Appeals concluded that the term "compensation" in Article 11, § 5 includes fringe benefits, such as health benefits. *Attorney General v Civil Service Comm'n*, unpublished opinion per curiam of the Court of Appeals, issued Jan. 8, 2013 (Docket No 306685) ("...these benefits are not gratuities or perks, but are rather compensation for services rendered") lv den 493 Mich 974 (2013).[15] There, the Legislature and Office of Attorney General recognized fringe benefits to be a part of "compensation" under Article 11, § 5. In Senate Concurrent Resolution 9 (of 2011), the Legislature attempted to veto the proposed "increase in rates of compensation recommended by the Civil Service Commission by eliminating the extension of health benefits to adults and their dependents living with but not related to a classified employee."[16] The "increase in rates of compensation" noted in SCR 9 had nothing to do with employees' wages. Yet, the Legislature recognized that it could only reduce that fringe benefit by way of a two-thirds vote under Article 11, § 5. What is more, the

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[15] Governor Snyder acknowledged the Commission's exclusive authority over fringe benefits after the Legislature passed 2011PA 297 (HB 4770), which prohibited *fringe benefits* for anyone other than the spouse, relative, or dependent of a public employee. The definition of public employee in PA 297 included "a person holding a position by appointment or employment in the government of this state." While the interpretation of laws is a matter for the judicial branch, the Governor's signing statement revealed both the accepted understanding of the Commission's authority and the novelty of Defendants' theory here:

> In addition, members of the classified state civil service are not covered by the terms of Enrolled House Bill 4770. Article XI, sec. 5 of the constitution gives the Civil Service Commission responsibility for setting rates of compensation and regulating all conditions of employment in the classified service. [Exhibit 26].

[16] See http://legislature.mi.gov/doc.aspx?2011-SCR-0009

Concurrent Resolution, as adopted by the Senate, noted that the Office of the Attorney General too considered fringe benefits to be within the meaning of "compensation" under Article 11, § 5:

> Whereas, The Chief Deputy Attorney General has opined in a February 16, 2011, letter that the term "compensation" in Article XI, Section 5 of the *Constitution of the State of Michigan of 1963,* **includes fringe benefits, such as health care benefits**. The Chief Deputy Attorney General has also opined that the Commission's decision allowing classified employees to enroll an additional adult and their dependents into the State Health Plan constitutes an increase in the rate of compensation that may be rejected or reduced by the Legislature within 60 days of transmission of the budget by a two-thirds vote of the members elected to and serving in each house of the Legislature.

Senate Concurrent Resolution 9 (Mar. 9, 2011) (emphasis added).[17]

Defendants cite *Oakley v Dept of Mental Health*, 136 Mich App 58; 355 NW2d 650 (1984) to support their argument that the Commission does not have final say on all things "compensation" within the classified civil service. *Oakley* is inapposite. The statute at issue there created supplemental disability benefits for employees of the Department of Mental Health injured on the job. The Court of Appeals held that the statute did not infringe upon the Commission's sphere of authority. *Id.* at 63-64. This matter – dealing directly with the Legislature's attempt to reduce civil servants' take-home pay and existing retirement benefits authorized by the Commission – is different. The supplemental benefits in *Oakley* provided *additional* benefits outside of the compensation package set by the Commission. Here, Act 264 undoubtedly reduces and fundamentally alters the compensation of civil servants set by the Commission, thereby distinguishing *Oakley*. The Court of Appeals in *AFSCME Council 25* rejected the same argument raised here by Defendants.

b. Defendants' Attempts (Some Brand New) to Interpret Article 11, § 5 Are Unavailing

[17] A copy of the Chief Deputy Attorney General's letter is Exhibit 27.

In their Application for Leave to Appeal, Defendants – relying again on the same arguments rejected in *AFSCME Council 25* – misstated the holding in *Brown v City of Highland Park*, 320 Mich 108; 30 NW2d 798 (1948) for the incorrect proposition that retirement benefits in 1940 "were considered gratuitous," suggesting that retirement benefits should not be considered "compensation" under Article 11, § 5. *Application for Leave to Appeal*, p 17. Defendants appear to have abandoned that argument in their most recent Brief. Nevertheless, that is not the holding in *Brown*. Rather, *Brown* concluded that the plaintiffs, who were City of Highland Park employees, did not have an express contract granting them an irrevocable pension as a portion of their salaries. *Brown*, 320 Mich at 115. Moreover, this Court's previous holdings in *Bowler* and *Kane*, *supra*, contradict Defendants' strained reading of *Brown*.

Now, Defendants have replaced their "gratuities" argument with an equally misguided, unsupported assertion – one that violates the cardinal rule of constitutional interpretation requiring this Court to give words their plain meaning. Without citing to *any* case law authority, Defendants contend that, with the phrase "rates of compensation," the "ratifiers were referring to job-specific salary, or pay *schedules*." *Defendants' Brief*, p 18 (emphasis original). No such language appears in Article 11, § 5, and no Michigan appellate court or Attorney General has ever interpreted the Commission's powers that way. In fact, if Defendants' strained and novel reading of the Constitution were true, every Court decision or Attorney General opinion over many decades concluding that "compensation" includes fringe benefits would be wrong. Moreover, that the 1963 Constitution added a provision giving the Legislature a 2/3 veto power over increases to the "rates of compensation" does not change the analysis as Defendants suggest. *Defendants' Brief*, p 21. Indeed, that paragraph uses the same "rates of compensation" phrase, which (again) has been interpreted for 70+ years to include fringe benefits.

Moreover, Defendants' reasoning is flawed because it is based on the incorrect interpretation that "compensation" means only a fixed salary. It does not. Had the people wanted "compensation" to mean only "salary," they would have said so. And nothing in Article 11, § 5 (or case law interpreting it) suggests that the Commission must – in exercising its *plenary* authority over compensation – assign job-specific, fixed retirement plans to the various classes of employees instead of adopting the statutory scheme to apply to all civil servants.

Equally curious is Defendants' contention that "fix rates of compensation" does not include retirement plans because retirement plans are for *former* civil servants, not those *in* the civil service. *Defendants' Brief,* p 19. Defendants are wrong, and they cite zero authority for the argument. In fact, the argument is patently absurd because Act 264 impacts *current* civil servants in that retirement benefits are offered as a fringe benefit to current civil servants, and only current employees are forced to choose to contribute 4% of their take-home pay to stay in the defined benefit program.[18]

Defendants' primary contention regarding the plain language of Article 11, § 5 is that the Commission must not be able to govern retirement benefits because "retirement benefits" or "pensions" are not mentioned expressly in the Constitution. Not only is this a myopic approach to constitutional construction, but it is contradicted by decades' worth of the court decisions and Attorney General opinions interpreting "compensation" in Article 11, § 5 and elsewhere to

[18] Further – contrary to Defendants' argument – that the Legislature created a *statutory* definition of "average final compensation" based on wage rates in Section 1(o) of PA 240 for purposes of calculating a retiree's retirement pension has no bearing on the meaning of "compensation" in Article 11, § 5 of the Constitution. *Defendants' Brief,* p 20. And Defendants have not cited any authority to support their new, made-up rule of constitutional interpretation in that regard. Similarly, that the Commission has set "compensation schedules" as part of its plenary authority does not mean that "compensation" in Article 11, § 5 is limited to "salary", as Defendants contend. *Id.*

include more than mere "wages." Defendants also contend that there is an "absence of a specific grant of authority to the Commission" to control retirement plans. *Defendants' Brief*, p 16. Again, they are mistaken because Article 11, § 5 expressly grants to the Commission the plenary power to control "compensation," which includes fringe benefits, including retirement.

Defendants also contend that Article 4, § 51 of the Constitution authorizes the Legislature to enact Act 264, asserting that "Sections 35a and 50a were enacted for the public purpose of encouraging the retention of experienced State employees by allowing them to purchase service credit to enhance their pensions." *Defendants' Brief*, p 25. Act 264 (Enrolled House Bill No. 4701), which contains a lengthy title explaining its purpose, says nothing close to Defendants' characterization of the purpose of the statute. That the statute applies to more State employees than just civil servants does not mean that it "advances a 'public purpose'," as Defendants contend. It is a flawed premise. And Act 264 does not "easily satisfy[y] the Article 4, § 51 criteria," which Defendants never identify. *Id.* To the contrary, Act 264 targets classified civil servants and their retirement system and not the general public. The other purported "public purpose" offered by Defendants is "to limit the effect that overtime pay during the last three years of employment would have on the calculation of a pension." *Id.* If tweaking the treatment of overtime for a classified civil servant's pension rises to the level of a "public purpose," it is difficult to imagine any act of the Legislature that would not meet that threshold. Act 264 is not for the public welfare. Nevertheless, the Legislature's power vis-à-vis Article 4, § 51 is, again, limited by the more specific provisions of Article 11, § 5. *Schnipke*, *supra*, 380 Mich 14, 19; see also *Kent Co Prosecutor v Kent Co Sheriff*, 425 Mich 718; 391 NW2d 341 (1986) (Legislature's Article 4, § 51 power is limited by other, specific grants of power within the constitution).

The case law upon which Defendants rely, *Oakley v Dept of Mental Health*, 136 Mich App 58; 355 NW2d 650 (1984), holds that statutorily-created "supplemental disability benefits" – that is, something other than a Commission-offered compensation package for civil servants – is not within the Commission's sphere of authority. Only in *obiter dictum* did the Court of Appeals state that the supplemental disability benefits were for the purpose of serving the "general welfare" under Article 4, § 51. *Oakley* is thus neither controlling nor instructive.

Similarly, *Dept of Transp v Brown*, 153 Mich App 773; 396 NW2d 529 (1986), cited by Defendants, is not binding or helpful, as it concluded that the MIOSHA statute is not unconstitutional as applied to civil servants because it protects the public *health* under Article 4, § 51. Act 264 has nothing to do with public health – the scope of Article 4 § 51. The Official Comments from the Con-Con debates explain only that Article 4, § 51 is "a new section, declaratory in character, instructing the legislature to adopt whatever public health measures it deems appropriate." 2 Official Record, Constitutional Convention 1961, p 3377. What is more, neither the Con-Con's Official Comments nor its substantive debates about Article 4, § 51 touch on the Legislature's powers expanding to anything beyond matters of public health (which are not at issue here) or somehow limiting the Commission's already-established powers. *Id.* at pp 2613-2618. When Article 4, § 51 was made part of the 1963 Constitution, there already existed the Commission's constitutional powers to fix rates of compensation and regulate conditions of employment, which courts and Attorneys General had identified before 1963 as "plenary" in that regard. Thus, to suggest that Article 4, § 51 now somehow supplants the Commission's plenary powers within those spheres of authority is a gross misreading of history and misapplication of established rules of constitutional construction. Defendants' argument is not supported by history or binding case law.

Defendants also rely on Article 9, § 24 of the 1963 Constitution to argue that the people "recognized that the Legislature had created a State retirement system." *Defendants' Brief*, p 24. Article 9, § 24 appears in the "Finance and Taxation" section of the Constitution and protects accrued financial benefits. It says nothing expressly about either the Legislature or the Commission. Thus, Article 9, § 24 does not help Defendants' argument. Even if it were a comment on the Legislature's power, that power is limited by the express language in the more specific provisions about the civil service in Article 11, § 5. *McDonald v Schnipke*, 380 Mich 14, 19; 155 NW2d 169 (1968).

Next, relying on a case involving rules of *statutory*, not *constitutional*, construction (*US Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1; 795 NW2d 101 (2009)), Defendants raise another new argument that, because of a 1978 voter-initiated amendment to Article 11, § 5 spelling out in detail the subjects over which State police troopers would be permitted to bargain, the original use of "compensation" in the 1963 Constitution could not have meant "retirement" or "pension" benefits. *Defendants' Brief*, pp 28-29. Defendants' argument ignores the historical context of the amendment to Article 11, § 5 and is flawed. Backed by State troopers, paragraph 5 of Article 11, §5 was added in 1978 by a ballot initiative called "Proposal G." With it the people authorized a specific form of collective bargaining for State police troopers and sergeants, as the Attorney General's office acknowledged:

> Proposal G...approved as a constitutional amendment by the electorate in November, 1978 provided **only** for certain specific privileges for a certain category of classified state employees (State Polices Troopers and Sergeants). It did not purport to, nor did it in fact, alter or amend **any other provision** of the state constitution.

OAG, 1979-1980, No 5499 (June 11, 1979) (emphasis added). Thus, it cannot be, under rules of *constitutional* construction, that the people in 1978 – by clarifying mandatory subjects of bargaining for State troopers – meant to alter the original, general meaning of "compensation" in

the 1963 Constitution for all civil servants. Further, to accept Defendants' reasoning would mean that "hours," "working conditions," and "aspects of employment" are something entirely different from "conditions of employment" because they too are enumerated separately in paragraph 5 of Article 11, § 5. No reasonable observer could agree.

In sum, the chorus of court decisions and Attorney General opinions cited above, including those issued before and around 1963, lead to only one conclusion: civil servants' retirement benefits – the nature of which Act 264 alters – are a form of "compensation" under Article 11, § 5. See, e.g., *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999) (noting general rule that constitutional construction requires "common understanding" analysis, "the sense of the words used that would have been most obvious to those who voted to adopt the constitution."). Moreover, Act 264 – which does *not* present a voluntary choice – forces civil servants to give up a fringe benefit (the DB plan) or reduce their take-home pay by making a mandatory contribution each month to the pension system equal to 4% of their wages. This contribution literally reduces a civil servants' take-home wage compensation. Similarly, if a civil servant does not want to contribute 4% of her wages under Act 264, she *must* give up her defined benefit pension plan as it exists. That too literally reduces civil servants' compensation. Either way, the Legislature cannot make those decisions because its only authority over civil servants' compensation is to reduce Commission-approved increases by a 2/3 veto.

2. The Commission Has Never "Acknowledged" that it Lacks Authority to Control Pension Benefits for Civil Servants

As the historical narrative above demonstrates, the Commission has never "acknowledge[d]" that it lacks authority over civil servants' retirement benefits, as Defendants contend. *Defendants' Brief*, pp. 31. In 1973, the Commission decided to create a non-contributory retirement benefit for classified civil servants, and it called upon the Legislature to

follow suit – which it did. That the Commission has adopted the statutory retirement system for classified civil servants is not evidence that it has relinquished any portion of its constitutional powers over compensation, as former Attorney General Frank Kelley explained:

> The fact that the Civil Service Commission has not seen fit to exercise its power to adopt a retirement program since its inception would not, of course, serve as a basis for denying that it has this power. Since its inception the commission has directed its attention to the salaries, insurance programs, annual leave provisions, sick leave provisions, and other fringe benefits that have been accepted as part of the compensation of state employees. No doubt the commission has abstained from adopting a retirement program for state classified employees because the state legislature had adopted a comprehensive retirement statute providing in considerable detail for retirement benefits for state classified employees and for the establishment of a retirement board to administer and manage the system. This statute is 1943 P.A. 240; [citation omitted]. The existence of the legislative act, however, does not preclude the civil service commission from adopting a supplementary retirement plan providing, of course, its adoption is in accordance with procedures outlined in [Article 11, § 5].

OAG, 1971-1972, No 4732, p 66 (Dec. 29, 1971). Likewise, that prior versions of the statute existed without constitutional challenge "is not dispositive." *AFSCME Council 25*, 294 Mich App at 27 ("The fact that the prior versions of MCL 38.35 were not the subject of a constitutional challenge does not render them constitutional.") citing *Walz v City of New York Tax Comm*, 397 US 664, 678; 90 S Ct 1409 (1970).[19] Thus, Defendants read too much into the Commission's decision to abstain from developing its own comprehensive retirement program for civil servants. The Commission – by approving the Legislature to create a retirement benefit plan – has not in any way relinquished its Constitutional powers.

[19] Further, as noted in *AFSCME Council 25* and above, Act 264 is different from 1943 PA 240 in an important way: Act 264 does not include a provision indicating that the Legislature reached agreement with the Commission and civil servants. The Commission, thus, had no reason to challenge the constitutionality of the previous versions of the statute.

3. Act 264 Cannot Usurp the Plenary Constitutional Authority of the Civil Service Commission to Regulate All Conditions of Employment

Relying on a recent Court of Appeals decision issued by a split panel, see *UAW, et al v Green, et al*, __ Mich App __; __ NW2d __; 2013 WL 4404430 (Aug. 15, 2013) (Exhibit 28), Defendants contend that Act 264 does not involve "conditions of employment" under Article 11, § 5, but even if it does, the Legislature, not the Commission, has the constitutional authority to govern "conditions of employment" for classified civil servants. The *UAW* majority opinion is currently being reviewed by this Court. As explained by the Commission in its *amicus* brief in the *UAW* matter, for this Court to accept Defendants' arguments and the reasoning in *UAW* would mean a sea-change in Michigan jurisprudence interpreting Article 11, § 5. In short, accepting Defendants' arguments that the Commission no longer possesses plenary authority over conditions of employment within the classified civil service will require this Court to adopt an entirely new rule of law.[20]

"The constitutional supremacy" of the Commission dictates that it "controls all conditions of employment and is vested with the plenary powers in its sphere of authority." *Welfare Employee Union v Civil Service Commission*, 28 Mich App 343, 351-52; 184 NW2d 247

[20] Defendants complain that the Court of Appeals should not have addressed the "conditions of employment" issue "because the Court of Claims never addressed that question." *Defendants' Brief*, 39. However, the "conditions of employment" issue has always been a part of this case. The Verified Complaint asserts that Act 264 "violates the requirement…that the [Commission] and only the [Commission] 'regulate all conditions of employment in the classified service'." *Complaint*, ¶ 65; see also ¶¶41, 43, 45, 63. What is more, Defendants filed a motion for summary disposition in the Court of Claims and spent no fewer than three pages arguing that Act 264 does not involve "conditions of employment." *Defendants' Motion for Summary Disposition*, pp 9-11, 18. Defendants admit that they again briefed the issue in the Court of Appeals. *Defendants' Brief*, p 40, n 7. To contend now that the Court of Appeals did not have authority to rule on the issue is desperate at best. See, e.g., *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56; 817 NW2d 609 (2012) (one of many cases holding that Court of Appeals may affirm trial court's grant of summary judgment even for different reasons).

(1970) lv den 384 Mich 824. The Commission's decision to offer civil servants a retirement package regulates a "condition of employment" under Article 11, § 5, and is within the exclusive province of the Commission. In *Council No 11*, this Court explained that the Commission's sphere of authority under Article 11, §5 extends to "employment-related activit[ies] involving internal matters such as job specifications, compensation, grievance procedures, discipline, collective bargaining and job performance." *Council No 11*, 408 Mich at 406. It cannot be reasonably disputed that details of retiree benefits is an internal matter related to employment in the civil service. Indeed, the Commission promulgates rules for civil servants' retiree benefits, and it preserves and approves the compensation packages, including retiree benefits.

In an analogous context, this Court, citing federal case law, has held that the details of pension and retirement benefits constitute "other terms and conditions of employment." *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 63; 214 NW2d 803 (1974) citing *Inland Steel Co v NLRB*, 77 NLRB 1; 21 LRRM 1310, enforced 170 F.2d 247 (CA 7, 1948) ("...we find ourselves in agreement with the [NLRB's] conclusion" that "a retirement and pension plan is included in 'conditions of employment' and is a matter for collective bargaining" under the NLRA) cert den 336 US 960; 69 S Ct 887 (1949).[21] Similarly, the Court of Appeals held in *Detroit Police Officers Ass'n v City of Detroit*, 142 Mich App 248; 369 NW2d 480 (1985) overruled on other grounds 482 Mich 18, that the details of fringe benefits – e.g., the details of medical insurance programs, including insurance coverage – constitute "conditions of employment" under Michigan's Act 312, MCL 423.243. And in *Mt Clemens Fire Fighters*

[21] The Attorney General's Office represents Defendants here and the Defendants in *UAW, et al v Green, et al, supra* (involving 2012 PA 349 and "agency shops"). Interestingly, in *UAW*, the Defendants have maintained ardently that PERA applies to the Commission and classified civil servants. Here, Defendants state the opposite: "...PERA...*does not apply* to classified State employees." *Defendants' Brief*, pp 45 (emphasis original).

Union, Local 838, IAFF v City of Mt Clemens, 58 Mich App 635, 645; 228 NW2d 500 (1975), the Court of Appeals explained that pension benefits, despite not being expressly referenced in a collective bargaining agreement that required arbitration over "conditions of employment," were subject to arbitration because "[a] change in remuneration to plaintiff via a change in the retirement plan constitutes a change in conditions of employment."[22]

For decades, Michigan courts have consistently held that fringe benefits, including retirement benefits, involve "conditions of employment." It strains credulity to suggest, as Defendants do, that "conditions of employment" in Article 11, § 5 now means something else. Because retirement benefits are "conditions of employment," the Legislature's attempt to change them unilaterally for classified civil servants is unconstitutional.

4. The Reasoning from the Recent Court of Appeals Majority Panel Opinion in *UAW*, Upon Which Defendants Rely, Should Be Rejected

The novel rule of law invented in *UAW*, upon which Defendants now rely – that the Commission's authority over all conditions of employment is subservient to the Legislature's because the two "share responsibility" – should be summarily rejected here (just as it should be rejected in that case). Defendants cite *UAW* as if it were settled law. It is not. Moreover, *UAW* is based on flawed reasoning and contradicts 70+ years of Michigan jurisprudence. Also, the *UAW* majority conceded, "the framers' and ratifiers' intent to grant the [Commission] full authority over the areas of **compensation**, determination of qualifications, and other specification of civil service employment." *UAW*, slip op at p 12 (emphasis added).

[22] As noted above, Michigan's Attorney General has opined that the Commission's authority to "fix rates of compensation" **and** "regulate all conditions of employment" under Article 11, § 5 (then Article 6, § 22) includes the authority to provide for fringe benefits for the classified servants, such as life insurance and health benefits. OAG, 1959-1960, No 3413, p 206 (October 12, 1959).

a. The Ratifiers of the Constitution Did Not Envision the Commission "Sharing" Responsibilities with the Legislature Over All Conditions of Employment for Civil Servants

The *UAW* majority opinion is based on the flawed premise that a constitutional "sharing of responsibility" over all conditions of employment within the classified civil service exists between the Commission and the Legislature. This Court, however, has held that the Commission's authority within its sphere is "plenary." See, e.g., *Reed*, *supra*; *Plec*, *supra*; *Groehn*, *supra*; *Viculin*, *supra*; and *Council No 11*, *supra*. A review of the relevant constitutional provisions, the circumstances of their adoption, and actual history shows that the Commission has exercised plenary power over all conditions of employment since its creation.

(i) No "Sharing of Responsibilities" Between the Commission and the Legislature Over All Conditions of Employment Existed from 1941 to 1963.

Contrary to the majority's opinion in *UAW*, the fundamental purpose of the 1941 amendment to the constitution adding Article 6, § 22 was not "to provide for an unbiased commission to promulgate and enforce rules to assure a merit-based system of government hiring and employment." *UAW*, slip op at p 5. This misstates the actual circumstances, intent, and understanding of the people who adopted Article 6, § 22 in 1941. An unbiased Commission was already created in 1937. By increasing the number of commissioners from three to four, the "Ripper Act" of 1939 arguably made the Commission more unbiased by providing for a split bipartisan composition. In 1941, the issue for the people was not bias, but authority. If Michigan's citizens were concerned with the Commission's composition or character, they could have more easily amended the act by the initiative process in Article 5, § 1 of the 1908 Constitution. This was not their focus. The *fundamental* purpose for a *constitutional* change was to enshrine the Commission's powers in the constitution to stop further legislative interference.

An "historical, constitutional sharing of responsibilities," as the *UAW* majority described it, could not have existed before January 1, 1941, when Article 6, § 22 first established a constitutional Commission. Actual history and concurrent legal opinions by our courts and Attorneys General, as cited above, show that no such sharing of authority over conditions of employment occurred from 1941 to 1963 either. The Commission was, instead, viewed as having plenary authority and exercising legislative power that had been stripped from the Legislature in response to the patronage system that had developed.

Notably, the Justices and Attorneys General, while Article 6, § 22 was in effect, recognized the people's intent in adding that constitutional provision. Although Article 5, § 29 of the 1908 Constitution (the pre-cursor to Article 4, § 49) still authorized in 1941 the Legislature to enact laws "relative to the hours and conditions under which men, women and children may be employed," no appellate court from 1941 to 1963 ever concluded that the Legislature retained the right to regulate conditions of employment in the classified service. Thus, there is no historical evidence to suggest that the Commission's authority was "shared" with the Legislature during that period. Justice Bushnell summarized the Commission's plenary powers in a decision the year after its creation as free from legislative involvement: "In its acts it is not subject to control or regulation by either the executive, legislative or judicial branch of our State government." *Reed, supra*, at 163 (Bushnell, J); see also the myriad cases and Attorney General Opinions cited above.

In sum, there has never before been a suggestion from the courts, the Attorneys General, the Commission, or the people that the period 1941 to 1963 was viewed as an era of "shared responsibility" over all conditions of employment for the classified service.

(ii) No "Sharing of Responsibilities" Over All Conditions of Employment Between the Commission and the Legislature Was Intended After 1963.

When the people ratified a new constitution in 1963, the existing provisions on the Commission's *specific* authority over conditions of employment within the classified civil service and the Legislature's *general* authority over conditions of employment were renumbered but left substantively unchanged. As explained above, since 1963, the courts (including this Court) and Attorneys General have consistently reaffirmed the Commission's plenary authority, concluding that the Legislature may not intrude into the Commission's sphere. The *UAW* majority opinion, however, portrays the last 50 years as an era of constitutional "sharing of responsibility" over all conditions of employment, but provides zero supporting authority.

The only change to Article 11, § 5 regarding the relationship between the Commission and Legislature in 1963 was a new legislative supermajority veto of pay increases authorized by the Commission. Compensation is within the Commission's sphere of plenary authority (as even the *UAW* majority conceded, *UAW*, slip op at p 12). Under *UAW* majority's theory of "shared responsibility," however, no constitutional revision would have been needed to allow a legislative veto. A general legislative enactment rescinding public pay increases could have accomplished the same result. As explained above, the constitutional convention record reveals that the new legislative veto was intended as *the* check on the Commission. 1 Official Record, Constitutional Convention 1961, pp 652, 653, 663. The spirited debate over allowing *any* legislative role over the classified service undercuts Defendants' reliance on *UAW's* reasoning that the Legislature enjoyed residual authority over conditions of employment for civil servants. See 2 Official Record, Constitutional Convention 1961, pp 662-67, 2909-11, 3187-92.

b. Article 4, § 49 Merely Continued the Legislature's Power Under the Previous Version (Article 5, § 29), Which the People Curtailed in 1940 By Adopting Article 11, § 5.

Relying on *UAW*, Defendants contend that Article 4, § 49 gives the Legislature supreme authority over the Commission to regulate conditions of employment within the classified civil service. They are wrong. The constitutional provision granting the Legislature general authority over conditions of employment was continued with minor changes in 1963. Before 1963, Article 5, § 29 of the previous constitution had read: "The legislature shall have power to enact laws relative to the hours and conditions under which men, women and children may be employed." Const 1908, art 5, § 29. Renumbered as Article 4, § 49 in 1963 that provision now reads: "The legislature may enact laws relative to the hours and conditions of employment." Const 1963, art 4, § 49. Although more succinct, the revised version does not demonstrate any desire to alter its meaning or effect. "May" is legally indistinguishable from "shall have power to." Similarly there is no practical difference between "hours and conditions under which men, women and children may be employed" and "hours and conditions of employment."

The Con-Con record shows no significant discussion of these minor changes, spanning just one page of the record. 2 Official Record, Constitutional Convention 1961, pp 2341-42. At most, the committee proposal recommended simply the "retention of this section." *Id.* The lone Delegate to speak on the proposal opined that it was largely surplusage and could have been stricken without much effect on the Legislature's authority. 2 Official Record, Constitutional Convention 1961, p 2342. Absent any textual basis or suggestion by contemporary observers that Article 4, § 49 and Article 11, § 5 represented a change in meaning from their predecessors, the analysis of their legal effect should be unchanged by their re-adoption in 1963. And aside from a few cases where other *specific* constitutional provisions were at issue, Michigan courts,

consistent with pre-1963 jurisprudence, have consistently precluded the Legislature from intruding into the conditions of employment within the classified civil service.

c. The Court of Appeals Panel Majority in *UAW* Invented a New Rule of Law Based on Flawed Reasoning and an Invented Rule of Constitutional Construction.

For more than 70 years, Michigan courts and Attorneys General have concluded that the Commission's plenary authority over classified conditions of employment was to the *exclusion* of the Legislature. Contrary to Defendants' argument, premised on *UAW,* Article 5, § 11's use of "regulate" is not distinguishable from Article 4, § 49's use of "enact" such that "regulate" is subservient to "enact" in terms of their constitutional significance.[23] In fact, this Court explained in *House Speaker v. Governor*, 443 Mich 560, *supra* at that "Article 11, § 5 gives the Civil Service Commission (an entity of the *executive* branch) the *legislative* power to establish pay rates and regulate conditions of employment in the classified service." (emphasis original). Thus, as this Court has already concluded, the Commission's power to "regulate" within its sphere is indistinguishable from the Legislature's power to legislate outside of that sphere.

Further, when the constitution discusses the power to enact laws, it refers to the central power of the Legislature, which is limited. See *In re Brewster Street Housing Site*, 291 Mich 313, 333; 289 NW 493 (1939) ("The Constitution of the State of Michigan is not a grant of power to the Legislature, but is a limitation on its powers."). If the Commission had been given the power to "enact" laws, the constitution would have required numerous other clarifications of

[23] This makes sense when considering the everyday vernacular describing what a legislature does – legislatures enact laws through a particular process. The Commission, of course, does not and need not "enact" rules in that traditional sense for them to have constitutional significance. That the Commission develops rules to govern within its sphere of authority differently than a legislature might "enact" a law should not undermine the force and effect (or constitutional significance) that those rules have within the classified civil service.

that power. Could "laws" enacted by the Commission embrace more than one object under Article 4, § 24? Could amendments to Commission "laws" be revised by reference to their titles under Article 4, § 25? Would Commission "laws" be subject to immediate effect only if approved by the Legislature under Article 4, § 27? Could the Legislature subsequently amend a Commission-enacted law? Could the Governor veto a Commission-enacted law? Using a term like "enact" would raise many harmonization requirements in the constitution.

Nonetheless, Defendants rely on *UAW* to interpret "regulate" to mean having only *secondary* authority, but the 1963 constitution demonstrates that the people used the term synonymously with "enacting" laws to reflect governing an area. For example, Article 2, § 4 grants the Legislature authority to "enact laws to regulate the time, place and manner of all nominations and elections." Article 4, § 43 requires legislative supermajorities to "regulat[e] the business" of trusts. Article 4, § 50 states that "The legislature may provide safety measures and regulate the use of atomic energy and forms of energy developed in the future. . . ." These legislative prerogatives are not lessened by their characterization as "regulating" powers.[24] See *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003) ("...every provision must be interpreted in light of the document as a whole."); 1 Cooley, Constitutional Limitations (8th r. ed.), p 135 (noting presumption that the same word is used to convey the same meaning in different parts of the constitution). Thus, Defendants' characterization of the term "regulate," based on the *UAW* majority opinion, is flawed.

Furthermore, until the *UAW* majority invented a new rule of law, no Michigan court or Attorney General has ever hinted that Article 4, § 49 (or its precursor Article 5, § 29) permits the

[24] Neither is Congress's power diminished under the federal Commerce Clause, which simply empowers Congress "To **regulate** Commerce with foreign Nations, and among the several States, and with the Indian Tribes". US Const, art I, § 8 (emphasis added).

Legislature to intrude into conditions of employment within the classified civil service. Traditional canons of constitutional construction reveal why. It is well-settled that every provision in the constitution must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another. See, e.g., *Lapeer Co Clerk*, 469 Mich at 156. If there is a conflict between general and specific provisions in a constitution, the more specific provision must control in a case relating to its subject matter:

> When there is conflict between general and specific provisions in a constitution, the specific provision must control. This second rule of construction is grounded on the premise that **a specific provision must prevail with respect to its subject matter, since it is regarded as a limitation on the general provision's grant of authority**. The general provision is therefore left controlling in all cases where the specific provision does not apply.

Advisory Opinion on Constitutionality of 1978 PA 426, 403 Mich 631, 639-640; 272 NW2d 495 (1978) (emphasis added).

Article 11, § 5 gives the Commission the specific power to regulate conditions of employment in the classified service; while Article 4, § 49 gives the Legislature only general power to enact laws regarding conditions of employment (without stating *whose* employment conditions are being regulated). The "specific/general" canon of construction is particularly apropos here because both Article 11, § 5 and Article 4, § 49 purport to regulate "conditions of employment." Because Article 11, § 5 focuses on a specific group of employees' "conditions of employment" (i.e., classified civil servants) and Article 4, § 49 does not, it cannot be reasonably disputed that Article 11, § 5 is more specific and, thus, controlling over the subject matter.

The *UAW* majority opinion ignored this well-established rule of constitutional construction and invented a new one: "The [Commission's] general/specific dichotomy, however, would be more accurately characterized as a broad/narrow dichotomy." *UAW*, slip op at p 12. It then stated that the Commission "possesses narrow power" and, thus, "[t]he [Commission's] power to act in its limited sphere...does not trump the Legislature's broader

constitutional powers." *Id.* The *UAW* majority's contrived rule of construction finds no basis in case law and it cited none. Defendants' reliance on *UAW* is, thus, misplaced.

Moreover, history and circumstances must inform the determination of the most reasonable interpretation of constitutional language:

> In construing constitutional provisions where the meaning may be questioned, the court should have regard to the circumstances leading to their adoption and the purpose sought to be accomplished.

Kearney v Bd of State Auditors, 189 Mich 666, 673; 155 NW 510, 512 (1915). Historical context cannot be ignored here to turn Article 11, § 5 and Article 4, § 49 – mostly unchanged in the 1963 constitution – on their head:

> Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power. In these cases we thought we could arrive at it from the public history of the times.

People ex rel. Bay City v State Treasurer, 23 Mich 499, 506 (1871). Further, "if conflicting constitutional provisions cannot be harmonized, the provision adopted later in time controls." *Adv Op on Constitutionality of 1978 PA 426*, 403 Mich 631, 643; 272 NW2d 495 (1978) (citations omitted). Article 4, § 49 reenacts a provision originally adopted in 1908, while Article 11, § 5 continues a provision originally adopted in 1940. Based on the foregoing, Defendants' reliance on *UAW* is as flawed as the *UAW* majority opinion. To accept Defendants' arguments under *UAW* would require a new rule of law that has never existed in Michigan.

d. The Language of Article 4, § 48 Does Not Mean that Article 4, § 49 Trumps Article 11, § 5

Relying on *UAW*, Defendants also contend that the specific exception of the classified service in Article 4, § 48 compels the conclusion that the lack of such a specific exception reveals an intent to confer in Article 4, § 49 legislative authority over conditions of employment within the classified civil service that trumps Article 11, § 5. *UAW*, slip op at p 10-11. However, no historical evidence shows any such intent by the drafters or the people. Such a result would be contrary to the understandings of the people who chose to create and continue a constitutional Commission with plenary authority in its sphere while severely limiting the Legislature's involvement. Under Defendants' reasoning, the absence of any exception for civil service in Article 4, § 49 would trump *any* limitation on the Legislature elsewhere in the constitution, which no previous Michigan appellate court has held. Defendants ask this Court to use Article 4, § 48, the stated purpose of which was to authorize legislative regulation of public labor law, except for the civil service (2 Official Record, Constitutional Convention 1961, p 2337), to *decrease* the constitutional powers of the Commission set forth in Article 11, § 5 (which empowers the Commission), turning a provision designed to recognize and protect Commission authority against those very purposes.

Besides renumbering and "improvement in phraseology," there was "no change" to the meaning of Article 4, § 49 in 1963. 2 Official Record, Constitutional Convention 1961, p 3277. Defendants' theory, derived from *UAW*, that an exception was purposefully placed in one article (Article 4, § 48) to substantively change the operation of two other provisions (Article 11, § 5 and Article 4, § 49) is unsupported and against the stated intent of adding the provision. Article 4, § 48 was added to the constitution in 1963 to clarify the Legislature's authority over issues related to public-sector labor relations. It provides: "The legislature may enact laws

providing for the resolution of disputes concerning public employees, except those in the state classified civil service." 1963 Const., art 4, § 48. Although the Legislature had already passed laws regulating the area, the convention record indicates that the provision was "simply relating that they have the power to do this." 2 Official Record, Constitutional Convention 1961, p 2338. To accept *UAW's* and Defendants' interpretation of Article 4, § 48 would require this Court to ignore the historical evidence from the Con-Con debates related to Article 11, § 5, discussed elsewhere herein, demonstrating the Legislature's limited role within the classified civil service.

IV. CONCLUSION

The Civil Service Commission's plenary authority over matters within its sphere of authority cannot reasonably be questioned. For decades, Courts and Attorneys General have held that "compensation" and "conditions of employment" include fringe benefits such as pension and retirement benefits. Defendants ask this Court to ignore decades of established law and create an entirely new rule of law that says the Commission's power over compensation and conditions of employment is something other than "plenary". This Court should, instead, affirm the trial court and Court of Appeals decisions and declare Act 264 unconstitutional as applied to the classified civil service because the Commission's constitutional powers prevail over the legislative enactment in this case.

Respectfully submitted,

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